No. 13681

In the United States Court of Appeals for the Ninth Circuit

ERNESTINE C. SINISCAL AND ELMER A. REED, APPELLANTS

v.

UNITED STATES OF AMERICA, AS TRUSTEE AND GUARDIAN AND EX REL. OF THE ESTATES AND PERSONS OF JASPER GRANT AND HAROLD F. THORNTON; HENRY B. TAYLOR AND ELIZABETH A. TAYLOR, HUSBAND AND WIFE; WILLIAM F. BRENNER AND FRED M. MARSH, APPELLEES

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UPON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES, APPELLANT

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OPINION BELOW

The district court did not write an opinion. The findings of fact and conclusions of law appear at R. 55-63.[1]

[1] At R. 20-27 are certain facts agreed to by all parties with the exception of appellees Reed and Siniscal, plus other facts agreed to by the Government and appellee Alexander. When the court made its ultimate findings and conclusions after trial, it expressly found as true all such facts contained in the Pretrial Order except that it made a minor amendment in one of them (R. 55-56).

JURISDICTION

The jurisdiction of the district court of this suit brought by the United States rests upon 28 U.S.C. sec. 1345. The trial court's first judgment of July 18, 1952, not printed in the record, was superseded by an amended judgment and decree entered July 28, 1952 (R. 66-69). A motion to amend the findings, conclusions and judgment in certain particulars was filed by the Government on July 28, 1952 (R. 64-65). On September 30, 1952, the court further amended its conclusions and judgment by interlineation (R. 69-70). A second motion to amend was filed by the Government following this amendment of the conclusions and judgment. This motion was denied on October 1, 1952 (R. 70). The earlier motion to amend was denied by the court on September 30, 1952, the date of its final judgment, but a formal order of denial was not entered until November 19, 1952 (R. 72). A notice of appeal was filed by appellee Siniscal on November 6, 1952, and this cross-appeal by the United States was by notice filed on November 20, 1952 (R. 73-75). The jurisdiction of this Court rests upon 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether a court which, at the suit of the United States, adjudges as void, because of fraud and violation of federal laws, certain instruments purporting to transfer out of the United States its title to real property constituting Indian allotments held by the Government under trust patents for its Indian wards, may require the Government to sell the restricted property in suit to restore to the defendants the consideration paid by them for the unlawful transfer.

2. Whether, if such a requirement can be sustained

on any theory, it was error for the court below to award to the defendants, as against the Government, interest from the date of the judgment until payment is made.

STATEMENT

On March 12, 1952, this action was instituted by the United States, on behalf of its dependent Indian wards Jasper Grant and Harold F. Thornton, against Henry B. Taylor, Elizabeth A. Taylor, Ernestine C. Siniscal, Elmer A. Reed, William F. Brenner, Fred M. Marsh and others unknown to cancel certain instruments purporting to transfer to the Taylors the title to 800 acres of valuable timber land in Curry County, Oregon, held by the United States under trust patents for the benefit of Grant and Thornton.

The judgment was, for the most part, favorable to the United States. For purposes of the Government's cross-appeal it is necessary only to summarize the pleadings. The Government's complaint (R. 3-11) sought cancellation of the following documents: (1) an order of August 7, 1951 (Ex. 5, R. 163) purporting to transfer the inherited interests of Grant and Thornton (the Indians for whom the Government holds the land under General Allotment Act patents) to appellee Siniscal; (2) an order of the same date removing restrictions on appellee Siniscal (Ex. 4, R. 181); (3) a deed of the same date from Siniscal to appellees Taylor (Ex. 3, R. 438), and (4) an option of the same date from the Taylors to Brenner and Marsh to purchase the land for $300,000.00 (Ex. 6, R. 109). The Government charged a conspiracy by the defendants to secure a transfer of the property for $135,000.00, a price known to them to be grossly inadequate. It alleged that the defendants knowing that a transfer of inherited in-

terests could only be made to a bona fide Indian purchaser,[2] fraudulently represented appellee Siniscal (an unallotted Siletz Indian) as a bona fide purchaser, and also falsely represented that the $135,000.00 paid for the property was money belonging to Siniscal. In reliance upon such false representation E. Morgan Pryse, Area Director of the Indian Office in Portland, Oregon, was deceived, misled, and induced to sign the order transferring the interests of the Indians Grant and Thornton to Siniscal. It was further alleged that the property was actually worth in excess of $350,000.00, and that the order transferring inherited interests was beyond the authority of Pryse, the Area Director.

In the Taylors' answer (R. 12-15), the status of the property as held by the Government in trust for Indian wards under General Allotment Act patents when this transaction was started was not questioned, execution and recordation of the instruments was admitted, but the allegations of conspiracy, fraud, overreaching, or other illegality were denied. Answers in substance the same were filed by appellee Reed and his daughter Siniscal (R. 15-17, 18-20).

Appellee Alexander intervened. He exhibited as the foundation of his claim an agreement with Reed to do the very thing the Government alleged had effected the purported sale to the Taylors (Pretrial Ex. 34, Fdg. 7, R. 23, Fdg. X, R. 59). This contract provided that Reed, as an Indian purchaser, would take title, paying $135,000.00 to be supplied by Alexander, and then convey the property to Alexander, who would pay Reed $12,500.00 for his services. Alexander's complaint

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[2] Otherwise, the land could be sold only after public auction (Fdg. IX, R. 58).

alleged that the defendants with the help of Clyde W. Flinn, then Realty Officer at the Indian Agency, had conspired to take over his project by substituting Reed's daughter as the strawman (a switch attractive to Reed and his daughter Siniscal by reason of raising the payment to Siniscal to $25,000.00 (Fdg. 4, R. 24-25)) and sought to compel a conveyance to him (R. 45-48). Lengthy trial proceedings ensued, at the conclusion of which the court below made the following findings and conclusions:[3]

The property involved was, at all times here in question, held by the United States under trust patents issued under the General Allotment Act of February 8, 1887, 24 Stat. 388, in trust for Grant and Thornton, Indian wards of the United States (Fdg. 2, R. 21-22). Prior to August 7, 1951, appellees Henry B. and Elizabeth A. Taylor agreed to pay the sum of $25,000.00 to whatever Indian person delivered to them title to the property in this case; a cashier's check for that amount, payable to appellee Ernestine C. Siniscal was obtained by Elizabeth A. Taylor and on August 7, 1951, was placed in escrow under an agreement between the Taylors and Siniscal to deliver the check to Siniscal upon the acquisition of an approved title by the Taylors. A check for $135,000.00 payable to the Treasurer of the United States, was given as consideration for the land

[3] The Government placed in evidence the depositions of four of the defendant-appellees, Elizabeth A. Taylor (R. 821-839), Henry B. Taylor (R. 842-925), Elmer A. Reed (R. 927-998), and Ernestine C. Siniscal (R. 778-819). The Government used defendant Brenner as a witness (R. 82-131), and also sought enlightenment by calling defendant Marsh (R. 498-504), John C. Blanford (R. 505-509) associated with the appellees in this transaction (Fdg. 5, 9, 11 and 13, R. 25-27), and Clyde W. Flinn (R. 510-515), former Area Realty Officer at the Indian Office in Portland, but all these declined to testify on the ground of self-incrimination.

(Fdg. 4, R. 24-25). (This check (Ex. No. 1, R. 194) shows on its face it was a cashier's check purchased by appellee Henry B. Taylor.)

The Order Transferring the Inherited Interests of Jasper Grant and Harold F. Thornton (Ex. No. 5, R. 163-166) was employed in this case for the first time in relation to trust allotted lands and purported to convey the inherited interest of Grant and Thornton in the trust allotted lands to Ernestine C. Siniscal by language conveying a restricted fee title (Fdg. III, R. 56-57). The significance of this finding resides in the fact that this order was copied from either of two standard forms regularly used by the Indian Service. But whereas, under the last paragraph of either of these regular forms (Ex. 21, R. 160-163, Ex. 22, R. 166-169), the title to the property remained in its prior status, i.e., fee title in the United States in trust for the benefit of Indians, under the order employed in this case a different paragraph was devised which purported to vest in Siniscal the fee title with a restriction against alienation (Ex. 5, R. 163-166). However, fee title was in the United States and no fee patent has ever been issued by the United States (Fdg. IV, R. 57). The authority of E. Morgan Pryse to sell the property is contained and limited by Order 551, 16 Fed. Reg. 2939 and Title 25, C.F.R. (Fdg. II, R. 56).

"Ernestine C. Sinistine (sic), at the time of the transaction herein involved, was acting as a mere agent for hire and as a conduit for title in behalf of defendants Taylor; she was not purchasing on her own behalf or for her own account and was not an Indian within the meaning and intent of the regulations contained in C.F.R. 25, Part 241, and in particular Section

241.11" (Fdg. V, R. 57). On August 6, 1951, appellee Siniscal, accompanied and assisted by her father, appellee Reed, submitted information to one La France, employee of the United States in the Swan Island Indian Agency, in connection with an application by Siniscal for removal of restrictions on the property here involved (Fdg. 3, R. 24, Ex. No. 9, R. 172-177). "False representations as to the actual status, financial responsibility, and intentions of Ernestine C. Siniscal were made to the Bureau of Indian Affairs and E. Morgan Pryse, Area Director, by defendants Taylor and their agent Ernestine C. Siniscal, and others, at the time the transaction involved herein occurred, and prior thereto" (Fdg. VI, R. 57). "The defendants Taylor and their agent, Ernestine C. Siniscal, and others, at the time this transaction occurred, concealed from the Bureau of Indian Affairs and E. Morgan Pryse, Area Director, the fact that the defendants Taylor were in truth the real buyers concerned in this transaction." (Fdg. VII, R. 58).

"The consideration in this transaction, $135,000.00, was grossly inadequate and shocking to public conscience and the Area Director, E. Morgan Pryse, at the time he signed the documents involved in this transaction, was unaware of the true value of the property involved herein" (Fdg. VIII, R. 58). "The evidence in this case clearly, certainly, and convincingly establishes the fact that defendants Taylor, and those persons acting in concert with them, were aware of the necessity of the requirement for a publicly advertised sale unless the property were purchased by a bona fide Indian on his or her own behalf and account, and that in order to avoid such requirement, Ernestine C. Siniscal was

by subterfuge presented as an actual bona fide purchaser, and the true identity of defendants Taylor as purchasers was concealed" (Fdg. IX, R. 58). "In reliance upon the fraudulent representations of the defendants Taylor and persons acting in concert with them, and by reason of the concealment by the aforesaid persons, all as set forth in Findings V to IX, inclusive, herein, E. Morgan Pryse, Area Director, signed the Order Transferring Inherited Interest and the Order Removing Restrictions, which he would not have done had he known the true facts" (Fdg. XI, R. 59).

The trial court drew the following conclusions: Appellee Siniscal, being merely an agent or conduit through whom the Taylors intended to acquire the trust property here involved, was not an Indian within the meaning of the law and regulations promulgated by the Secretary of the Interior, particularly Section 241.11, C.F.R. (Concl. II, R. 60). The Order Transferring Inherited Interests to Siniscal (Ex. No. 5, R. 163-166) and the Order Removing Restrictions (Ex. 4, R. 181-183) were beyond the authority of E. Morgan Pryse as Area Director and are null and void (Concl. III, R. 60). The deed from Siniscal to the Taylors and the contract between Siniscal and the Taylors are null and void under 25 U.S.C. 348.[4] (Concl. IV, R. 60). By reason of the fraudulent misrepresentations made to the United States and its agent E. Morgan Pryse by the Taylors and those acting in concert with them, and the concealment by them of pertinent facts from Pryse, and by reason of the fact that the sum of $135,000.00 was a grossly inadequate price for the property, the

[4] This citation appears in the record as 23 U.S.C. 348, clearly an inadvertent error.

entire transaction should be rescinded (Concl. VI, R. 61). The court further concluded that the Government was entitled to a judgment and decree declaring null and void and setting aside the Order Transferring Inherited Interests, the Order Removing Restrictions on Ernestine C. Siniscal, the deed from Siniscal to the Taylors dated August 7, 1951, a later deed from Siniscal to the Taylors, dated August 10, 1951, the option agreement of August 7, 1951, under which the Taylors gave an option to Brenner and Marsh to purchase the property for $300,000.00, and also the escrow agreement relating to the $25,000.00 placed in escrow for Siniscal by the Taylors, "and any and all other instruments or papers in connection with this purported sale to the defendants Henry B. Taylor and Elizabeth A. Taylor" (Concl. VII, R. 61-62).

The trial court also made the following conclusions (R. 62-63) which give rise to the questions raised by the United States on this appeal:

> VIII
>
> That the lands and timber involved in this suit including the logs felled and not removed from said property shall be duly advertised and sold to the highest bidder by the Bureau of Indian Affairs of the Department of the Interior and out of the proceeds there should be deducted the expenses of such sale.
>
> IX
>
> Good cause exists for the return to Henry B. Taylor and Elizabeth A. Taylor the sum of $135,000.00, together with interest at the rate of 6% per annum from July 18, 1952, by order of Court 9/30/52, turned over by them to the Area Director of the Bureau of Indian Affairs for the account of Harold Thornton and Jasper Grant.

X

Such amount is to be paid said Taylors from the following sources:

1. All money belonging to Jasper Grant and Harold F. Thornton and now in the possession of the Portland Trust & Savings Bank as Conservator of said Indians shall forthwith be turned over to Henry B. Taylor and Elizabeth A. Taylor.[5]

2. The lands and timber involved in this suit, including the logs felled and not removed from said property, shall be duly advertised and sold to the highest bidder by the Bureau of Indian Affairs for the Department of the Interior. From the money so received, after payment of expenses of the sale, the difference between the amount turned over to the Taylors by the Portland Trust & Savings Bank and $135,000.00 shall be paid to Henry B. Taylor and Elizabeth A. Taylor.

Judgment was entered in accordance with these findings and conclusions (R. 66-69). By an appropriate motion (R. 64-65) the United States asked the court below to strike conclusions VIII, IX and X and companion provisions of the judgment. When on September 30, 1951, the court below by interlineation (R. 70) added the requirement that interest be also paid to the Taylors, the Government filed a second motion attacking this provision. Both motions were denied (R. 70, 72). On November 6, 1952, appellant Siniscal filed a

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[5] Evidence in the case established that of the $135,000.00 paid by the Taylors, $55,000 was disbursed to the Indians. The remaining $80,000 was delivered to the Conservator bank, which holds this and presumably whatever part of the $55,000.00 the Indians had retained at the time the Conservator was appointed in proceedings in the State court.

notice of appeal, and on November 20, 1952, the Government countered with a cross-appeal (R. 71, 73-75).

SPECIFICATIONS OF ERROR

The United States makes the following specifications of error as set forth in its statement of points to be raised on its cross-appeal (R. 1003-1004):

1. The trial court erred in finding (Fdg. XII, R. 59) that good cause exists for the return to the Taylors of the consideration paid by them, for the reason that such finding shows on its face that it is a mere conclusion of law, and for the further reason that it is not supported by the evidentiary findings of the court below.

2. The trial court erred in concluding (Concl. IX, R. 62) that good cause exists for the return of the consideration to the Taylors and in concluding (Concl. X, R. 63) that the Government must sell the property for that purpose, for the reason that the court could not condition the granting of relief to the United States upon return of the consideration, nor accomplish the same result indirectly by ordering sale of the property for the purpose of securing such return.

3. The court erred in entering that part of its judgment which orders that the lands and timber involved in this suit be sold by the United States and that a portion of the money so received be turned over to the Taylors.

4. The trial court erred in adjudging that interest on the sum of $135,000.00 from July 18, 1952, until paid, should be paid to Henry B. Taylor and Elizabeth A. Taylor.

ARGUMENT

I

Where Deeds or Other Instruments Purporting to Divest the Government's Title to Indian Allotments Held by the United States in Trust for its Indian Wards Are Void, Because of Fraud in Their Procurement or Because They Violate Federal Laws and Regulations for the Indians' Protection, the Government is Not Obliged to Restore the Consideration Paid for Such Conveyances and May Not be Required to do so or to Sell the Allotments for that Purpose.

This is an action by the United States against appellees Taylor and others to have declared null and void certain instruments purporting to vest in the appellees Taylor a title to property held by the United States for the benefit of Indians under trust patents issued under the General Allotment Act of February 8, 1887, 24 Stat. 388. The trial court has decreed that the transaction challenged by the Government is void on two grounds, (a) that fraud and misrepresentation were practiced upon agents of the United States in procuring the instruments upon which the defendants assert their title, and (b) on the ground that the issuance of such instruments by government agents was beyond their authority, with the result that such instruments are violative of federal laws, regulations and restrictions relating to such property. The court below, however, in addition to entering judgment voiding the instruments complained of, further decreed that the appellees Taylor must be made whole by having restored to them the $135,000.00 paid by them as consideration for the property, and that the United States, through its Secretary of the Interior, must sell the property sued for and apply the proceeds of such sale to the partial payment of the amount adjudged to the

Taylors.[6] These provisions requiring the Government to repay the Taylors and ordering the Government to sell the property cannot be sustained.

A. *The court could not condition relief to the United States upon restoration to the Taylors of the consideration paid by them:*—Preliminarily, it should be remembered that property held by the United States under trust patents for Indian benefit is, like any other federal property, an instrumentality for the execution of governmental policies of the United States and enjoys the same immunities. Thus property so held for Indian benefit under a General Allotment Act trust patent is "an instrumentality employed by the United States for the benefit and control of this dependent [Indian] race" and, just as other federal property, is immune from taxation by any local or state government without the consent of Congress, since otherwise the lands would "become so burdened that the United States could not discharge its obligations to the Indians without itself paying the taxes imposed from year to year, and thereby keeping the lands free from incumbrances." *United States* v. *Rickert,* 188 U.S. 432, 437-438 (1903). And in *Minnesota* v. *United States,* 305 U.S. 382, 386 (1939), involving property so held by the Government, the court stated that "a proceeding against property in which the United States has an interest is a suit against the United States" and held that such property is immune, just as is other federal property, from the State's power of eminent domain

[6] Under the judgment the United States is required to pay whatever portion of the $135,000 is not paid by the Portland Trust and Savings Bank. Since that company holds $80,000, the United States is required to pay over at least $55,000 plus interest and possibly more. See *supra,* fn. 5, p. 10.

unless Congress has consented to condemnation proceedings. Hence there is no difference in the federal interest, immunities, and rights, between the property held as here in trust for Indian wards and any other federal property. But rights are insecure if remedies for their violation are absent, and it would be strange indeed if the Government's remedies, when it seeks to protect its property by judicial proceedings against those who assert title to it under deeds which either violate federal laws or were procured by fraud, should be less in the case of one class property than in the other. That the Government's remedies are not different is demonstrated conclusively by the following decisions of the Supreme Court of the United States dealing with the precise question here presented in cases involving both public lands of the United States and property held by the Government as an instrumentality for Indian benefit.

Sixty-odd years ago the Supreme Court in *United States* v. *Trinidad Coal Co.,* 137 U.S. 160 (1890), dealt with the following situation: The laws of the United States permitted, under specified conditions, the entry of coal lands of the United States by an individual, but limited the acreage subject to such entry to 160 acres. An "association of persons" could legally enter only 320 acres. Certain officers and employees of the coal company filed individual entries totalling around 954 acres, and in reliance upon such filings the Government issued patents. The entire purchase money under these entries was paid by the company to the entrymen, who then paid it to the Government, the company having taken warranty deeds covering all of the lands from the supposed individual entrymen. Also involved

were false representations on the part of at least one entryman as to his qualifications as an entryman. The court held the entries to be both fraudulent and violative of federal land laws. There the same contention was made that apparently moved the court below, that the Government must refund the monies paid to it in order to obtain the relief it sought. The court rejected the suggestion, stating (pp. 170-171):

> It is contended by the defendant that the United States * * * asking equity, must do equity; and, consequently, that the bill is defective in not containing a distinct offer to refund the moneys which, it is alleged, were furnished by the defendant to the several persons to whom patents were issued. The rule referred to should not be enforced in a case like the present one. In the matter of disposing of the vacant coal lands of the United States, the government should not be regarded as occupying the attitude of a mere seller of real estate for its market value. * * * the defendant is a wrongdoer against whom the government seeks to vindicate its policy in reference to the development of its vacant coal lands. * * * If the defendant is entitled, upon a cancellation of the patents fraudulently and illegally obtained from the United States, in the name of others, for its benefit, to a return of the moneys furnished to its agents in order to procure such patents, we must assume that Congress will make an appropriation for that purpose, when it becomes necessary to do so. *The proposition that the defendant, having violated a public statute in obtaining public lands that were dedicated to other purposes, cannot be required to surrender them until it has been reimbursed the amount expended by it in procuring the legal title,*

> *is not within the reason of the ordinary rule that one who seeks equity must do equity; and, if sustained, would interfere with the prompt and efficient administration of the public domain.* * * * (Italics supplied.)

The question was again considered with specific application to lands held by the United States for Indians in the case of *Heckman* v. *United States,* 224 U.S. 413 (1912). There the United States sued to cancel deeds for their allotments given by Indians to third parties, on the ground that the deeds violated the restrictions on alienation imposed by the laws of the United States enacted for the protection of the Indians. The trial court sustained a demurrer on the ground that the United States had no interest entitling it to sue. *United States* v. *Allen,* 171 Fed. 907 (C.C.E.D. Okla. 1909). The court of appeals reversed (179 Fed. 13, C.A. 8, 1910) and the case was appealed to the Supreme Court *sub nom. Heckman* v. *United States,* 224 U.S. 413 (1912). In that court the argument was made that the allottees, having received consideration for the deeds, should be made parties "in order that equitable restoration may be enforced." The court rejected this, stating (224 U.S. 446-447):

> * * * Where, however, conveyance has been made in violation of the restrictions, *it is plain that the return of the consideration cannot be regarded as an essential prerequisite to a decree of cancellation.* Otherwise, if the Indian grantor had squandered the money, he would lose the land which Congress intended he should hold, and the very incompetence and thriftlessness which were the occasion of the measures for his protection would render

> them of no avail. The effectiveness of the acts of Congress is not thus to be destroyed. The restrictions were set forth in public laws, and were matters of general knowledge. Those who dealt with the Indians contrary to these provisions are not entitled to insist that they should keep the land if the purchase price is not repaid, and thus frustrate the policy of the statute. *United States* v. *Trinidad Coal Co.*, 137 U.S. 160, 170, 171. (Italics supplied.)

The court proceeded to note a suggestion by the appellants that there may be instances where the Indians have property which could be reached without violating any federal policy, such as unrestricted property the Indians might own. But the court made it plain that, assuming such case, the securing of relief against the Indians could have no bearing on the right of the Government to cancellation of the illegal conveyances. In other words, irrespective of whether in a given case any rights exist as against the Indian, none exist against the Government to repayment of the consideration, as a prerequisite to its relief, and hence the question of restoration is irrelevant to the right of the Government to cancellation.[7] The *Heckman* decision was so applied in the recent case of *Hall* v. *United States*, 201 F.2d 886 (C.A. 10, 1953), by a court of appeals having wide experience in Indian litigation. A contrary rule leads to an utter absurdity. For example, an Indian

[7] The discussion in the *Heckman* decision regarding possible recourse against private property of the Indians is significant here with respect to the balance of $80,000.00 of the consideration paid, which amount Government officials turned over to the Portland Trust & Savings Bank, a conservator appointed for the Indians Grant and Thornton. The court below ordered this fund repaid to the Taylors (R. 63, 68). We do not take any position with respect to this provision of the judgment, since under the authorities cited the Government's right to relief is independent of the restoration of the consideration.

may mortgage his allotted and restricted lands to a white man for $10,000.00 without federal approval. What earthly good is the Government's right to void that mortgage if a court can burden that right by requiring the Government to sell the property and pay to the mortgage holder his $10,000.00 with interest? *To do so is to enforce the mortgage in fact while purporting to nullify it in law,* and renders the Government's right to preserve the property inviolate and unfettered for its declared purposes a myth. Cf. *United States* v. *Gilbertson,* 111 F.2d 978, 980 (C.A. 7, 1940).

The rule that the United States may not be required to return the consideration when it sues for and receives judgment annulling and cancelling a patent was again declared in *Causey* v. *United States,* 240 U.S. 399 (1915), involving a homestead entry. The Government's case was predicated on fraud on the part of the entryman in the oath and proof whereby the patent was secured. The entryman had paid, in land scrip, the statutory price of $1.25 an acre. There it was again urged that the Government, as a prerequisite to its right to relief, must tender the consideration it had received, and the court, citing the *Trinidad* and *Heckman* decisions, again rejected the contention. The court concluded its decision with this statement (p. 402):

> * * * That rule [that the plaintiff must tender and return the consideration], if applied, would tend to frustrate the policy of the public land laws; and so it is held that the wrongdoer must restore the title unlawfully obtained *and abide the judgment of Congress as to whether the consideration paid shall be refunded.* * * * (Italics supplied.)

Following the decisions of the Supreme Court in the *Trinidad, Causey* and *Heckman* cases, it fell to the lot of this Court to forge a link in the chain of authority in the celebrated case of *Pan-American Petroleum Co.* v. *United States,* 9 F. 2d. 761 (1926). There the Government sued the oil company and another corporation to void oil leases on certain naval reserve lands on the ground of fraud practiced in their procurement. An added element, not present in the prior cases, was that the fraud was practiced by the defendant corporations with the aid of an official of the United States, the then Secretary of the Interior. The trial court gave judgment voiding the leases but decreed that the defendants must be reimbursed by the Government for expenditures of around $10,000,000.00 which they had made. Both sides appealed, the Government challenging the provisions of the judgment requiring that the defendants be made whole at the Government's expense.

This Court had no trouble in deciding that the trial court erred in ordering restitution. After stating that the equitable maxim underlying the trial court's erroneous action "is only a guiding principle and not an exact rule governing all cases," this Court proceeded to point out (9 F.2d 771-772) that the prior decisions of the Supreme Court in the *Trinidad, Heckman* and *Causey* cases covered the question like a blanket and reversed the judgment insofar as it gave affirmative relief against the Government. The Supreme Court granted certiorari to review the whole case. That Court, of course, affirmed. *Pan-American Co.* v. *United States,* 273 U.S. 456 (1927). After again showing that the question was foreclosed by its prior decisions, the Supreme Court made the following statement which,

one would suppose, should have settled the point (273 U.S. at pp. 509-510):

> * * * The United States does not stand on the same footing as an individual in a suit to annul a deed or lease obtained from him by fraud. Its position is not that of a mere seller or lessor of land. *The financial element in the transaction is not the sole or principal thing involved.* This suit was brought to vindicate the policy of the Government, to preserve the integrity of the petroleum reserves and to devote them to the purposes for which they were created. *The petitioners stand as wrongdoers, and no equity arises in their favor to prevent granting the relief sought by the United States.* (Italics supplied.)

The foregoing decisions of the Supreme Court and this Court establish beyond question these propositions: (1) upon proof by the Government of the illegality of conveyances or any other instruments purporting to transfer or burden the Government's title to property, whether that property is held by the Government for the benefit of all of its citizens or for the benefit of individual Indian wards, the Government is entitled to a judgment in its favor; (2) the rule in private litigation that one seeking cancellation must tender and refund the consideration paid has no application whatever; and (3) the question of whether restoration is to be made is not a question for the courts, but is one for Congress to decide.

There is thus no uncertainty as to the law. The mystery here is what moved the trial court, in the face of such law, to conclude that "good cause exists for the return to Henry B. Taylor and Elizabeth A. Taylor,

the sum of $135,000.00, together with interest, at the rate of 6% per annum from July 18, 1952" (Concl. IX, R. 62-63).[8] That court's own findings and conclusions establish not only that the transaction by which they claimed to have acquired the property was violative of federal law, but that the Taylors were participants in a scheme to defraud the Government. The reprehensible nature of this transaction sufficiently appears from the findings and conclusions hereinbefore set out and needs no elaboration here. The case here is covered completely by the cited decisions of this Court and the Supreme Court.

B. *A restoration to the Taylors of the consideration they paid cannot be indirectly accomplished by ordering the Government to sell the property for that purpose:*—Persuaded, no doubt, by the authorities hereinbefore cited that the Government *did have* a clear right to relief without itself paying into court the consideration the Taylors had paid, the court below nevertheless undertook to place the same onus on the Government by ordering it to sell the very property it is adjudged entitled to recover. The court cannot, of course, thus accomplish by indirection the result which the authorities clearly forbid. The judgment here would frustrate federal policy to the same extent as in those cases.

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[8] The court below also in its findings of fact stated that "good cause exists" for the return of the consideration to the Taylors (Fdg. XII, R. 59). On its face this is not a fact finding but a conclusion. And the erroneous inclusion of it in the findings of fact cannot, of course, operate to subject the Government to the onus imposed on review of true findings by Rule 52(a), F.R.C.P. The question is shown by the cases hereinbefore discussed to be purely a legal question, and neither this Court's power, nor that of the Supreme Court, fully exercised in the cited cases, to redress an error in conflict with them, can be thus impaired. Moreover, there is nothing in the other findings to indicate of what the "good cause" consisted.

Moreover, the court thus not only misconceived the course of action open to it under the principle relied on by the Taylors, i.e., withholding relief to the United States until the consideration shall be paid, but has in the process attempted to exercise a non-existent power. This follows because the property, as adjudged by the court, is federal property, the disposition of which lies solely within the control of the Congress. Const. Art. IV, Cl. 3. It follows that disposition of such property may be made only in the manner allowed by Congress. With regard to property of the character here involved—inherited trust allotments—Congress has provided for their sale during the trust period, but has authorized not the courts but the Secretary of the Interior so to dispose of them *in his discretion.* Act of June 25, 1910, 36 Stat. 855, as amended, 25 U.S.C. sec. 372.

The court below exhausted its power when it determined and adjudged that the Government was entitled to a judgment that the property is still property of the United States, and its attempt then to order sale by the Secretary of the Interior is, we submit, a usurpation of discretionary authority placed by Congress solely in that officer of the United States.

II

The Action of the Court in Allowing Interest at 6% from the Date of Judgment is Unjust and Erroneous.

By the amended judgment of July 28, 1952 (R. 66-69), the court below ordered return of the consideration to the Taylors, and two months later, by interlineation, inserted in the conclusions and judgment a requirement that the Taylors also be paid interest at the rate of 6%

from July 18, 1952, the date of the first judgment entry (R. 69-70). We submit that such action is entirely unjustified in the circumstances of this case.[9] That the Government should be required to act as a banker and pay the Taylors 6% on the money used by them in the execution of an illegal transaction is fantastic. It should not be countenanced unless it is clearly mandatory.

Absent statutory authority, interest on judgments does not lie against the federal government. *United States* v. *Sherman,* 98 U.S. 565, 567-568 (1878). And although the award of interest here in question expends itself on property held by the United States in trust for the benefit of Indian wards of the Government, it is still a judgment against the United States for which Congressional consent must be given. Cf. *Minnesota* v. *United States,* 305 U.S. 382, 386 (1939). Hence, to support the award of interest in this case it is mandatory that in some way it be shown that Congress has authorized the award of interest now challenged. We do not know of any statute which might possibly be construed to allow interest in this case.

Moreover the present case is clearly outside of the policy which underlies the enactment of statutes allowing interest on judgments. "* * * whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor." *United States* v. *Sherman,* 98 U.S. 565, 567 (1878). Interest is allowed for delay in payment chargeable to the judgment debtor. Here the court below has made an order

[9] The Court does not reach this question if it sustains the first proposition that the Government cannot be required to make restitution to the Taylors through sale of the property.

whose execution, *under the terms of the order itself,* imposes a delay in payment which the Government cannot avoid and for which it should not be penalized. Thus, assuming the order to be valid, it will take time to comply with it by advertising and selling at public sale. While, if the property must be sold, a sale under competitive bidding is a salutary requirement, the resultant delay in payment is surely not chargeable to the Government. There is another type of delay which stems from the circumstance that the Government cannot safely proceed under the judgment until this litigation is finally laid to rest. For example, the action of appellee Siniscal in filing an appeal of itself precluded compliance with the judgment. As between the Taylors and the United States, the responsibility for this situation is clearly on the Taylors. The Government has been put to the necessity of litigating, not by choice, but by the actions of the Taylors and their associates. And even if the order to make restitution through sale of the property were sustained, we insist that the burden of delay properly belongs on the Taylors, and that the imposition of interest in the meantime is not supported, as it must be, by statutory authority, or by logic.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment, insofar as it requires the Government to restore the consideration to the Taylors, orders the sale of the property for that purpose, and awards interest against the Government, should be reversed.

Respectfully,

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